

Burn, Sell, or Drive: Forfeiture in the History of Drug Law Enforcement

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I. INTRODUCTION

Forfeiture is a tactic that has been employed in the enforcement of drug laws in the United States continuously for 150 years. Opium, the original opioid¹ and the first prohibited drug, was the expensive commodity at the center of legal disputes over drug-related forfeitures from the mid-1800s. More or less summary seizure of valuable property from drug offenders, especially of drugs themselves² and of vehicles, has consistently yielded revenue for enforcement

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¹ The word opioid, though much more recently coined, is interchangeable with opiate, both historically meaning any preparation derived from or containing opium or that produces similar sedating, dulling effects. See *Opioid*, OXFORD ENGLISH DICTIONARY (3d ed. 2004); *Opiate*, OXFORD ENGLISH DICTIONARY (3d ed. 2004).

² Although “[e]veryone knows that the law denies people property rights in illegal drugs and other contraband,” Caleb Nelson, *The Constitutionality of Civil Forfeiture*, 125 YALE L.J. 2446, 2448 (2016), this article assumes that the forfeiture of such property is worth consideration. Prohibited drugs in particular are extraordinarily valuable by weight, and their

agencies and generated publicity for campaigns of drug prohibition. The U.S. Treasury's use of forfeiture, originally for tax collection and then for drug and alcohol prohibition, helped fund and expand its enforcement agencies. Local and state governments have also employed statutory forfeiture in drug control with similar results.³ Prohibitionists and enforcers have long partnered with willing media outlets to showcase dramatic, high-value forfeitures, coverage that appeals to the retributive and moralistic impulses of readers and supports the prohibitive project.⁴

The ethical and moral problems with forfeiture statutes have only fully reached the public sphere over the past twenty-five years or so. Forfeiture has been dubbed "policing for profit,"⁵ said to lead to "constitutional kleptocracy"⁶ and to amount to "forfeiting our property rights."⁷ These arguments have not fallen upon deaf ears. In February 2019, the Supreme Court unanimously reversed the state of Indiana's forfeiture of a vehicle seized from a man convicted of selling heroin, incorporating the Excessive Fines Clause of the Eighth Amendment to the states and enabling the defendant to build a defense against the \$42,000 forfeiture upon that right.⁸ Justice Thomas in 2017 had critically described how civil forfeiture has developed into a tool for law enforcement to collect numerous small payouts from the marginalized and defenseless.⁹ He questioned whether the legal status quo on the "broad modern forfeiture practice can be justified by the narrow historical one."¹⁰

But the historical practice was not so narrow. Far prior to the statutory forfeiture expansions of the 1970s and 1980s, vast amounts of personal property were confiscated and then destroyed, sold, or pressed into service by government agents in the course of enforcing drug laws.¹¹ The use of civil

status as contraband or nuisance is not innate, but rather shifts according to where and by whom they are owned.

³ See generally Michael A. DiSabatino, Annotation, *Evidence Considered in Tracing Currency, Bank Account, or Cash Equivalent to Illegal Drug Trafficking so as to Permit Forfeiture, or Declaration as Contraband, under State Law—Explanation or Lack Thereof*, 4 A.L.R. 6th 113 (2005) (reviewing state court forfeiture cases).

⁴ See, e.g., 'Lady Day's' Car May Be Seized, PITT. COURIER, Nov. 11, 1950, at 1.

⁵ See Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 42 (1998) ("[L]aws have become especially punitive to drug offenders and increasingly profitable to the law enforcement agencies . . ."). See generally Jerome H. Skolnick, *Policing Should Not Be for Profit*, 7 CRIMINOLOGY & PUB. POL'Y 257 (2008) (responding to Eric Blumenson & Eva Nilsen, *supra* note 5).

⁶ See generally Stefan B. Herpel, *Toward a Constitutional Kleptocracy: Civil Forfeiture in America*, 96 MICH. L. REV. 1910 (1998) (providing an extended review of LEONARD LEVY, A LICENSE TO STEAL: THE FORFEITURE OF PROPERTY (1996)).

⁷ See generally HENRY J. HYDE, FORFEITING OUR PROPERTY RIGHTS: IS YOUR PROPERTY SAFE FROM SEIZURE? (1995) (detailing the use of forfeiture law to seize property).

⁸ See *Timbs v. Indiana*, No. 17-1091, slip op. at 1–2 (U.S. Feb. 20, 2019).

⁹ See *Leonard v. Texas*, 137 S. Ct. 847, 848 (2017).

¹⁰ *Id.* at 850.

¹¹ See *infra* Parts IV, VI.

forfeiture in rem as opposed to criminal forfeiture in personam has merely exacerbated this problem, by routinizing the confiscation of assets in drug cases and expanding the reach of enforcers beyond offenders themselves. Civil and administrative proceedings that deprive people of property even when they are not found guilty have inspired special outrage, but forfeitures as penalties and remedies for crimes are also problematic. The history of this scattered body of drug law, and especially of its enforcement, is not well understood. Even the earliest such laws liberally granted proceeds of forfeitures to enforcement agencies and their personnel.¹² As courts upheld forfeitures and enforcers' adoption of seized wealth, an entrepreneurial spirit lay hold in drug control. Forfeiture became a solution to the problem of a public that desired a government tough on crime but light on taxation. Aided by a self-interested press, this same public washed its hands of the high human cost of such enforcement, instead eagerly consuming unsympathetic narratives and images that framed forfeiture as just desserts for an immoral caste.

II. FORFEITURE AS REVENUE COLLECTION IN FOUNDING-ERA STATUTES

The historical connection between drug-related forfeiture and revenue generation is clear, for the former originated in federal tax law. The first Congress codified forfeiture in order to enforce collection of import duties and excise taxes on domestic products, which were then the only sources of revenue for a government deep in debt.¹³ Perhaps because forfeiture in rem was deeply rooted in England's methods of revenue collection,¹⁴ the first Congress drew on forfeiture both as a penalty for smuggling and as a means of securing money owed to the United States.¹⁵ Moreover, Congress and the Treasury devised a structure of financial incentives for informers and seizing officers that encouraged zealous enforcement of the revenue laws. Customs collectors were empowered from their creation to board and search any ship and to open and search packages on suspicion of any attempt to defraud the revenue; and could, with a warrant, enter and search private property on land where they suspected smuggled goods were kept.¹⁶ The first customs laws called for forfeiture of ships and vessels only under specific circumstances: for landing merchandise worth more than \$400 at night or without the collector's permission;¹⁷ for fraudulently receiving a drawback for exportation and then delivering the goods to another U.S. port;¹⁸ or for landing dutiable goods anywhere except the designated

¹² See *infra* Part II.

¹³ See Nelson Dingley, Jr., *The Sources of National Revenue*, 168 N. AM. REV. 297, 298–99 (1899).

¹⁴ Nelson, *supra* note 2, at 2457–60.

¹⁵ *Id.* at 2468.

¹⁶ Act of July 31, 1789, ch. 5, §§ 23–24, 1 Stat. 29, 43 (repealed 1790).

¹⁷ *Id.* § 12, 1 Stat. at 39.

¹⁸ *Id.* § 34, 1 Stat. at 46.

ports.¹⁹ Bringing dutiable foreign goods into the country overland meant forfeiture of the goods “together with the carriages, horses, and oxen, that shall be employed in conveying the same.”²⁰ Procedures were set for advertising and auctioning forfeited merchandise and ships²¹ and for dividing proceeds among the U.S. Treasury, the collector himself, other seizing officers, and informers, if any.²²

The first Congress also laid a contentious internal tax on distilled spirits and set out a system of districts and personnel for enforcing collection.²³ Removing untaxed spirits from a distillery could trigger their forfeiture “together with the cask or casks containing, and the horses or cattle, with the carriages, their harness and tackling, and the vessel or boat with its tackle and apparel employed in removing them.”²⁴ It authorized the seizure of untaxed liquor “found in the possession of any person,” the possession itself being “presumptive evidence that the [spirits] are liable to forfeiture”;²⁵ and divided the proceeds of forfeitures between the Treasury and “the person or persons who shall make a seizure, or who shall first discover the matter or thing.”²⁶ This so-called Whiskey Tax was repealed in 1801, reinstated from 1813 to 1817, then repealed; and no internal federal taxes were again levied until the Civil War.²⁷

Although opium in various forms had been available in apothecaries’ shops and among general merchandise since colonial times, its consumption by early Americans apparently was neither robust nor recreational (unlike distilled spirits, which they consumed in large quantities).²⁸ For the first century of American independence, opium was a valuable, highly concealable commodity that became contraband when smuggled—much like silk, diamonds, and other sumptuary goods. In 1790, opium was subject to an ad valorem import duty of 7.5%, and in 1794, of 12.5%; it was duty-free from 1816 to 1828, when a 15% duty was imposed.²⁹ In 1832, the opium duty was abolished along with that on many other items as part of a general reduction in the tariff.³⁰ Congress imposed a specific duty of 75¢ per pound on opium in 1842, modified to 20% ad valorem

¹⁹ *Id.* § 40, 1 Stat. at 48–49.

²⁰ *Id.* § 40, 1 Stat. at 49.

²¹ *Id.* §§ 36–37, 1 Stat. at 47–48.

²² Act of July 31, 1789, § 38, 1 Stat. at 48.

²³ Act of Mar. 3, 1791, ch. 15, § 4, 1 Stat. 199, 199–200.

²⁴ *Id.* § 19, 1 Stat. at 204.

²⁵ *Id.* § 28, 1 Stat. at 206.

²⁶ *Id.* § 44, 1 Stat. at 209.

²⁷ See TUN YUAN HU, *THE LIQUOR TAX IN THE UNITED STATES 1791–1947*, at 30–35 (1950).

²⁸ In 1860, “production of whiskey was one of the chief industries of the nation, and the still . . . an almost necessary appendage to every farm.” FREDERIC C. HOWE, *TAXATION AND TAXES IN THE UNITED STATES UNDER THE INTERNAL REVENUE SYSTEM 1791–1895*, at 137 (1896).

²⁹ S. DOC. NO. 22–24, at 10 (1832).

³⁰ Act of July 14, 1832, ch. 227, § 3, 4 Stat. 583, 590.

in 1846 and \$1 per pound in 1861.³¹ Such rates were in line with those on imported liquors and other foreign luxuries, with a view to generating revenue rather than protecting American trade or banning harmful substances.³² Ship passengers, particularly the Chinese immigrants who arrived to the United States beginning in the mid-19th century and brought along their opium smoking habit, continuously smuggled the compact and expensive article into the country.³³ In 1853, the appraiser at the San Francisco custom house wrote the Secretary of the Treasury that packages of duty-free goods “require as much examination as the dutiable; for in the cheap and free articles we frequently find opium and other valuable articles concealed in tea, sugared pork, or Chinese vegetables.”³⁴ Yet most smoking opium probably continued to enter the country legally, imported in bulk by early-arriving Chinese merchants who paid the customs duty and then sold their countrymen’s favored brands at retail in small amounts, enough for daily use.³⁵ The tariff did not yet distinguish between crude opium and the more expensive refined opium for smoking, creating an opportunity for importers to pay a relatively low duty on the priciest brands.

III. ANTI-CHINESE, ANTI-SMUGGLING, AND THE FIRST PROHIBITIVE DRUG TAX

On the West Coast, as the local distaste for Chinese immigrants grew, so did the public scorn for opium smoking. At the same time, the Civil War was greatly increasing the national debt, and Congress in typical fashion sought relief by raising import duties. Yet lawmakers were beginning to recognize the need to balance higher rates of taxation against the resulting incentive to evade. So when, in 1862, a revised tariff separated smoking opium from crude opium and taxed the former at 80% ad valorem (increased to 100% in 1864),³⁶ the likely intent was to effect a prohibition of this odd foreign habit, and thereby to inconvenience Chinese immigrants.³⁷ Such result could be had while avoiding

³¹ S. DOC. NO. 54-219, at 112, 125, 142 (1896).

³² See, e.g., *id.* at 113 (detailing the rates for spirits and other luxury items).

³³ See, e.g., *Celestial Frauds: Smuggling Opium—Ingenious Expedients*, S.F. CHRON., Nov. 9, 1869, at 3 (describing various smuggling methods).

³⁴ H.R. DOC. NO. 33-74, at 135 (1854).

³⁵ See ELIZABETH SINN, *PACIFIC CROSSING: CALIFORNIA GOLD, CHINESE MIGRATION, AND THE MAKING OF HONG KONG* 200 (2013).

³⁶ S. DOC. NO. 54-219, at 183, 212.

³⁷ No other article in the tariff of 1862 is subject to an ad valorem rate of 80% or more; neither are any articles except opium taxed at 100% in 1864. *Id.* at 178–95, 202–18 (1896). The Congressional Record contains no discussion of either increase in the opium duty. However, it does contain debate over Congressman August Sargent of California’s failed attempt to amend the 1862 tariff to discourage Chinese immigration, by raising the duty on cleaned, or milled, rice, the bulk of which imports in the state were consumed, he said, by Chinese immigrants. See CONG. GLOBE, 37th Cong., 2d Sess. 2938 (1862) (“[The Chinese] are, as a class, characterized by vicious habits; and the State would be very glad to get rid of them altogether. In smoking opium and in intoxicating themselves with other drugs, they

damage to American manufacturers of morphine—needed to treat wounded soldiers—and other therapeutic preparations of opium including patent medicines.

At the end of the Civil War, a Radical Republican Congress enacted the Smuggling Act of 1866 as a way to both pay down the war debt and to flex the United States' muscles against external threats in an uncertain geopolitical environment.³⁸ Thereafter a prohibitive tax on smoking opium desired by one state, California, was bolstered by federal law via extravagant customs enforcement powers. The Smuggling Act's provisions for searching, seizing, arresting, and using force, along with those established by a concurrent modification of the internal revenue law, set the tone for federal policing of drugs and alcohol for decades to come. The Act gave broader authority to members of an enlarged force of personnel³⁹ to board any vessel and to "inspect, search, and examine the same, and any person, trunk, or envelope on board, and to this end, to hail and stop such vessel if under way, and to use all necessary force to compel compliance."⁴⁰ If it appeared that any goods or merchandise were subject to forfeiture, any member of this force could seize the property *and* the vessel and could arrest or pursue "any person engaged" in the violation.⁴¹ Furthermore, enforcers of the new customs law could apprehend and examine "any vehicle, beast, or person on which or whom he or they shall suspect there are goods, wares, or merchandise which are subject to duty or shall have been introduced into the United States in any manner contrary to law" and could "search any trunk or envelope, wherever found, in which [they] may have a reasonable cause to suspect there are goods which were imported contrary to law," and when finding such goods, should seize them.⁴² Furthermore,

Every such vehicle and beast, or either, together with teams or other motive-power used in conveying, drawing, or propelling such vehicle, goods, wares, or merchandise, and all other appurtenances, including trunks, envelopes, covers, and all means of concealment, and all the equipage, trappings, and other

have, by their carelessness, set fire to their own wooden houses, and been the cause of the destruction of many of our towns. . . . In morals and in every other respect they are obnoxious to our people. The women are prostitutes and the men petty thieves. But how can we keep them out?"⁴³). Sargent later chaired committee hearings about Chinese immigration during which he brought up opium smoking dozens of times. S. REP. NO. 44-689, at 92, 130, 133, 211 (1876). *See generally* DIANA L. AHMAD, *THE OPIUM DEBATE AND CHINESE EXCLUSION LAWS IN THE NINETEENTH-CENTURY AMERICAN WEST* (2007) (examining how the spread of opium smoking and its culture fueled anti-Chinese propaganda).

³⁸ *See* Andrew Wender Cohen, *Smuggling, Globalization, and America's Outward State, 1870–1909*, 97 J. AM. HIST. 371, 379–80 (2010).

³⁹ Act of July 18, 1866, ch. 201, § 2, 14 Stat. 178, 178 (empowering "any officer of the customs, including inspectors and occasional inspectors, or of a revenue cutter, or authorized agent of the Treasury Department, or other person specially appointed" by customs and naval officials).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

appurtenances of such beast, team, or vehicle shall be subject to seizure and forfeiture⁴³

The Act provided fines and imprisonment for smuggling activities and for refusal to submit to a search, and penalized any person who “shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale” of goods once imported, and called for the forfeiture of those items.⁴⁴ A defendant’s possession of such items “shall be deemed evidence sufficient to authorize conviction, unless the defendant shall explain the possession to the satisfaction of the jury.”⁴⁵ Proceeds from the forfeiture of seized goods, vessels, and vehicles were to be distributed according to a 1799 law on customs collection.⁴⁶

The increased authorization to search and seize people and property, along with increases in the tariff and economic incentives for enforcers, engendered widespread fraud and corruption in short order.⁴⁷ After San Francisco collectors seized a large cargo of openly landed opium for a minor undervaluation, an editorial in one local paper fretted that federal efforts to nurture trade between the western U.S. ports and China risked defeat by a “vicious system of revenue laws, which throws the import trade into the hands of a class of spies and informers, who, for personal profit, pervert the plain intentions of the law.”⁴⁸ Grift was common and did indeed seem to perpetuate the very same frauds on the U.S. revenue that the law had aimed to mitigate. Treasury Special Agent John McLean reported to Congress an 1868 incident during which customs personnel seized a large shipment of smuggled opium, stashed in the ceilings above various state rooms, on a ship from China.⁴⁹ Instead of reporting the haul as a single seizure, they divided it into small ones worth less than \$500 each,⁵⁰ which entitled them to divide the proceeds from the opium’s sale without first remitting the unpaid duty to the Treasury.⁵¹

⁴³ *Id.* § 3, 14 Stat. at 178.

⁴⁴ *Id.* § 4, 14 Stat. at 179.

⁴⁵ Act of July 18, 1866, ch. 38, § 4, 14 Stat. 178, 179.

⁴⁶ *Id.* § 31, 14 Stat. at 186. By terms of the Act of March 2, 1799, ch. 22, § 91, 1 Stat. 627, 697, after deducting the costs of litigation and sale, remaining funds were split into moieties, or equal parts, and sometimes further divided among enforcement personnel. Under ordinary circumstances, half was paid to the Treasury and half was divided between the collector, naval officer, and surveyor. *Id.* But if an informer not employed by the government gave information leading to the forfeiture, he was to receive half of the half normally split between the officers, and the officers were to split the remaining quarter; and generous provisions were made for the officers of revenue cutters who made seizures leading to forfeiture. *Id.*

⁴⁷ See Cohen, *supra* note 38, at 382–84 (describing the extent and variety of smuggling and official corruption after 1866, such as the collection of \$316,700 in moieties over three years by a single Treasury agent).

⁴⁸ Editorial, *The China Trade—Seizures*, DAILY ALTA CAL., Mar. 15, 1867, at 2.

⁴⁹ S. REP. NO. 41-47, at 108–09 (1870).

⁵⁰ *Id.*

⁵¹ Act of March 2, 1867, ch. 188, § 1, 14 Stat. 546, 546.

On the West Coast, the new style of tough customs enforcement resulted in continual harassment of passengers arriving from China as federal and local agents sought to make high-value opium seizures. Beginning in 1867, San Francisco newspapers regularly carried advertisements for custom house auctions dominated by numerous lots of seized opium, some in large quantities and some reflecting multiple smaller seizures from individual passengers.⁵² The rough and invasive searches of Chinese immigrants caught the attention of newspaper reporter Mark Twain, who had spent most of the 1860s in California, growing increasingly outspoken about anti-Chinese prejudice.⁵³ In 1870 he was contributing a column to *The Galaxy* magazine for which he wrote a series of satirical letters from a fictional Chinese immigrant to a friend at home.⁵⁴ In one installment, the Chinese traveler describes his arrival at the port of San Francisco, where a small packet of opium becomes a pretext for officials to confiscate all his belongings and arrest his companion:

I stepped ashore jubilant! I wanted to dance, shout, sing, worship the generous Land of the Free and Home of the Brave. But as I walked from the gang-plank a man in a gray uniform* kicked me violently. . . . I was about to take hold of my end of the pole which had mine and Hong-Wo's basket and things suspended from it, when a third officer hit me with his club to signify that I was to drop it, and then kicked me to signify that he was satisfied with my promptness. Another person came now, and searched all through our basket and bundles, emptying everything out on the dirty wharf. Then this person and another searched us all over. They found a little package of opium sewed into the artificial part of Hong-Wo's queue, and they took that, and also they made him prisoner and handed him over to an officer, who marched him away. They took his luggage, too, because of his crime, and as our luggage was so mixed together that they could not tell mine from his, they took it all.

*Policeman.⁵⁵

At this time, the American press was awash in "cheap print" following the rapid proliferation of inexpensive periodicals to a highly literate public that delighted in crime news and salacious reporting.⁵⁶ California workers, hackles raised toward the cheap Chinese labor force as the gold rush petered out and the economy contracted, could vicariously enjoy the custom agents' games of cat and mouse by reading the news. Coverage of opium arrests and seizures reflected casual racism mixed with a keen fondness for intrigue and vice.

⁵² See, e.g., *Notice to Claimants*, DAILY ALTA CAL., Jan. 3, 1868, at 2.

⁵³ See Mark Twain, *Goldsmith's Friend Abroad Again* (1870), reprinted in COLLECTED TALES, SKETCHES, SPEECHES, & ESSAYS 1852–1890, at 455, 455–65 (Louis J. Budd ed., 1992).

⁵⁴ See *id.* at 457.

⁵⁵ *Id.* at 457.

⁵⁶ See PAUL STARR, *THE CREATION OF THE MEDIA: POLITICAL ORIGINS OF MODERN COMMUNICATIONS* 123–39 (2004).

Readers were especially fascinated by Chinese passengers' methods of opium concealment, as in this 1869 news account of Chinese arrivals to San Francisco:

Almost every conceivable method has been adopted by the smugglers to elude the vigilance of the revenue force. Opium has been brought from China concealed in tea chests, braided in the cues of immigrants, secreted in birds' nests and hidden in the soles of the elegant Chinese shoe. Elaborately constructed beetles of monstrous size, apparently preserved specimens in natural history, have been discovered to be made almost entirely of opium. Eggs have been broken whose yolks were great compact boluses of the narcotic drug, sufficient to get fifty Celestials as drunk as a poppy seed vessel on the ocean in a typhoon. Cigarettes have been found which contained opium instead of tobacco. Dried fish have been found stuffed with it, and we are not sure that a mummified-looking old Celestial, so dried up that he looked as if he might be a first cousin to the sun and had held a place of trust near King Sol's person, who was carefully carried in a hack from the China steamer, not long since, was not the solidified extract of the poppy ingeniously constructed into an automaton.⁵⁷

News accounts often drew on stereotypes and poked fun at the immigrants. For example, after describing how Treasury agents had discovered Chinese passengers disguising wax-covered, egg-shaped brass vessels filled with opium as "pickled eggs," a writer for the *San Francisco Call* commented:

These are the kind of eggs with which John settles his coffee, or makes a Mongolian omlete. [sic] What a sleepy hen it must be that lays such an egg! The question arises, will its chicken *pipe* its note now as usual since the seizure? We are not sure whether it is of the Shanghai stock.⁵⁸

An 1881 article in the *San Francisco Examiner* relayed an unnamed customs officer's ramblings:

The worst smugglers, and the ones that give us the most trouble, are the Chinese. I don't mean the raw coolies, fresh from Canton, who don't know the difference between the violation of the revenue laws and the common breaking of one of the commandments, but the old hands who have made two or three voyages. . . . Raw and manufactured silks, pearls, ivory ornaments, Chinese drugs and opium are the principal articles they attempt to smuggle. As for the first-named articles we have no trouble in detecting their presence, as they are bulky and awkward to stow away, except about the person, and we always search them down to their measly, yellow hides. Opium is what troubles us.⁵⁹

⁵⁷ *Celestial Frauds*, *supra* note 33, at 3.

⁵⁸ *A Cunning People*, SANTA CRUZ SENTINEL, June 4, 1864, at 1.

⁵⁹ *The Dead Smuggler*, S.F. EXAMINER, Dec. 1, 1881, at 3.

This article ended with a grisly tale of the officer's discovery of smuggled opium in the stomach of a corpse brought ashore by two Chinese men who had hacked off its legs and stowed it in a trunk.⁶⁰

IV. SEIZING THE OPIUM: ENFORCEMENT, CORRUPTION, AND THEIR PRESS

The smoking opium most beloved by the Chinese in California was made by expert "cookers" in Hong Kong from crude opium produced in India.⁶¹ Congress targeted smoking opium with prohibitive import duties from 1862; at the hands of California senators and congressmen, often using the language of temperance, duties on smoking opium were pushed ever higher, at one point reaching \$12 per pound when the going price was around \$7.⁶² Importers worked around the tariff by allowing their opium to be seized by customs and then buying it at auction for a price well below the duty, an arrangement that benefited local customs officers.⁶³ Employees of the auction house selling seized opium in San Francisco were suspected of colluding with a Chinese "opium ring" to sell at just above the government's minimum price but later exchange it for slightly more, keeping the difference instead of their commission.⁶⁴ Due to these and other workaday frauds at ports across the country, Congress passed an Anti-Moiety Act that limited rewards to customs personnel and informers and required the funds to be channeled through the Treasury.⁶⁵

Before long, enterprising Chinese in San Francisco were preparing their own smoking opium from raw opium, which was subject to a much lower tariff because it was used by pharmaceutical firms to manufacture morphine.⁶⁶ In 1880, the United States entered into a treaty with China in which each agreed that its own citizens would not be permitted to trade in opium at any port of the other, and the Treasury instructed collectors in San Francisco to seize and forfeit any opium imported by any Chinese national.⁶⁷ Several wholesalers and bankers soon began importing opium and selling it to Chinese merchants, pocketing a tidy profit.⁶⁸ Also in 1880, Congress placed an excise tax on the domestic production of smoking opium, and the Treasury issued an onerous booklet of regulations that included registration and specifications for "factories," which were required to be open to federal inspectors at all times; a \$5000 bond to

⁶⁰ *Id.*

⁶¹ See SINN, *supra* note 35, at 191, 194.

⁶² S. DOC. NO. 61-377, at 81-83 (1910).

⁶³ See, e.g., *Shady Opium Deals*, S.F. CHRON., Nov. 24, 1893, at 10.

⁶⁴ See *The Opium Auctions*, S.F. CHRON., Nov. 27, 1893, at 8.

⁶⁵ Act of June 22, 1874, ch. 391, § 2, 18 Stat. 186, 186.

⁶⁶ See *Opium Smuggling*, S.F. CHRON., July 8, 1887, at 6.

⁶⁷ See CHAS. J. FOLGER, SYNOPSIS OF THE DECISIONS OF THE TREASURY DEPARTMENT ON THE CONSTRUCTION OF THE TARIFF, NAVIGATION, AND OTHER LAWS FOR THE YEAR ENDING DEC. 31, 1882, at 92 (1883).

⁶⁸ See *Opium Traffic Laws*, S. F. CHRON., Feb. 24, 1894, at 11.

procure a license, which could only be had by American citizens; and affixing stamps to each package after paying \$10 per pound in excise.⁶⁹ Not a single license was issued, and the Treasury collected no taxes.⁷⁰ Illicit domestic opium refinement, or “cooking” of banned crude opium, was so successful in San Francisco that one of the largest and most sensational seizures made at that port involved American merchants colluding with a customs inspector to smuggle locally made smoking opium *out* of the city on a boat to Hawaii.⁷¹ In the case that unfolded, the owner of the goods intervened to have the seized opium returned on the grounds that he had not in fact been smuggling opium into the country.⁷² Although evidence presented at the trial tended to prove the petitioner’s version of facts and that customs agents had apparently fabricated parts of their story to help secure the forfeiture, the opium was forfeited because, as the judge wrote, civil cases need not be proven beyond reasonable doubt.⁷³

Journalists did not ignore the bad behavior at the custom house. Many in California had a nuanced view of the opium problem and looked warily to both Congress and to local governments for solutions. In 1879, discussing a proposed municipal anti-opium ordinance, the editors of the *Los Angeles Herald* approvingly quoted a contemporary writer in support of their argument that opium dependence should be confronted with medical rather than legal remedies:

If philanthropy and law have failed to abolish alcoholic drunkenness, law will assuredly fail to abolish opium eating, for law is a gauze barrier against the attack of money, and the druggist who will not sell the most profitable article of his stock because a legislature forbids, is a man above the average of tradespeople. If such a [prohibitive] law were passed, a special policeman would have to be placed in every drug store to watch the druggist, and a detective to watch the policeman—but who should watch the detective? Even detectives will take money, drink whiskey and eat opium.⁷⁴

The editors of the *San Francisco Chronicle* wrote that it was common knowledge that very high duties encouraged smuggling.⁷⁵ Gone were the days of the smuggler as a romantic figure in European literature, the editors wrote,

where the low, black lugger is chased by the King’s ship, and the goods are landed at night and concealed in some cave or secret chamber unknown to the

⁶⁹ U.S. INTERNAL REVENUE, NO. 16, REGULATIONS CONCERNING THE TAX ON OPIUM MANUFACTURED IN THE U.S. FOR SMOKING PURPOSES UNDER THE ACT APPROVED, OCTOBER 1, 1890, at 4–7 (1890).

⁷⁰ *The Sticky Drug*, S. F. CALL, Jan. 7, 1893, at 7.

⁷¹ *See* Three Thousand Eight Hundred and Eighty Boxes of Opium v. United States, 23 F. 367, 369, 373 (C.C.D. Cal. 1883).

⁷² *Id.* at 376.

⁷³ *Id.* at 395–96.

⁷⁴ *The Abuse of Opium*, L.A. HERALD, May 18, 1879, at 2.

⁷⁵ *Opium Smuggling*, S.F. CHRON., Jan. 18, 1888, at 4.

revenue officers; but here, where a meek-eyed Mongol hides away a box or package of prepared opium under his coat or in his box, and is ignominiously hauled about and poked here and there until it is found, there is nothing romantic about it. All the romance nowadays consists in catching some Custom house officer dividing the plunder with the smuggler and seeing his attempts to get out of the meshes of the law.⁷⁶

V. THE STATE'S ELECTIVE ROLE IN PROHIBITING DRUGS AND ALCOHOL

California's statewide regulation of opium and cocaine sales began early, in 1891, when the legislature passed a Pharmacy Act requiring a pharmacist's license to "conduct any pharmacy or store for dispensing or compounding medicines,"⁷⁷ commanding pharmacists to record buyers' names and sale amounts of scheduled drugs, including opium,⁷⁸ and creating a seven-member board of pharmacy charged with issuing licenses and investigating infractions.⁷⁹ In 1907, a state Poison Act prohibited the sale of morphine, codeine, heroin, opium, and cocaine without a prescription;⁸⁰ in 1909, lawmakers added cannabis (as "Indian hemp") to the schedule of poisonous drugs requiring labeling and record-keeping,⁸¹ outlawed possession of opiates and cocaine without a prescription,⁸² and forbade doctors to prescribe them to "habitual users."⁸³ Amendments in 1913 made it a crime to possess pipes and other paraphernalia for smoking opium as well as "extracts, tinctures, or other narcotic preparations of hemp, or loco-weed."⁸⁴ This version also authorized "any peace officer" to seize prohibited opiates, hemp, and paraphernalia, requiring judges to condemn such seizures and deliver them up to the pharmacy board, which could in turn destroy them *or* dispose of them "either by gift to the medical director of California state prisons or state hospitals or by sale to wholesale druggists, the funds received from such sales to be applied by the board of pharmacy to the carrying out of the provisions of this act or the [Pharmacy Act]."⁸⁵ In an early example of codified "equitable sharing," fines and forfeited bond money would be divided between the state pharmacy board and the city or county enforcement agency in a 75/25 split.⁸⁶

The pharmacy board drafted local officers into their raiding parties and seized opium and paraphernalia in the course of arresting Chinese smokers as

⁷⁶ *Id.*

⁷⁷ Pharmacy Act, ch. 85, § 1, 1891 Cal. Stat. 86, 86.

⁷⁸ *Id.* § 10, 1891 Cal. Stat. at 89.

⁷⁹ *Id.* § 6, 1891 Cal. Stat. at 87.

⁸⁰ Poison Act, ch. 102, § 8, 1907 Cal. Stat. 124, 126.

⁸¹ Act to Amend the Poison Act, ch. 279, sec. 3, § 7, 1909 Cal. Stat. 422, 423–24.

⁸² *Id.* sec. 4, § 8, 85 Stat. at 424.

⁸³ *Id.* sec. 4, § 8, 85 Stat. at 425.

⁸⁴ Act to Amend the Poison Act, ch. 342, sec. 6, § 8(a), 1913 Cal. Stat. 692, 697.

⁸⁵ *Id.* sec. 7, § 8(b), 1913 Cal. Stat. at 697–98.

⁸⁶ *Id.* sec. 4, § 7, 1913 Cal. Stat. at 694.

well as doctors, druggists, and other drug sellers and users.⁸⁷ In 1922, the value of a seizure in San Francisco was placed at more than \$1500 and described like this:

The confiscated outfit included everything from opium, yen shee and yen pock to pipes, els to scrape the pipes and “gee rags,” which are used in the pipe bowl to prevent air from entering. Little peanut oil lamps with glass guards and trimming scissors were also seized, together with devices used for cooking opium. A delicate pair of scales of ivory and brass was also seized.⁸⁸

In 1923, a state narcotics inspector posed for a newspaper photograph with seized drugs arranged much like a store window product display, under the heading, “Dope From Many Raids Shipped North.”⁸⁹ The drugs, reportedly valued at \$30,000, had been seized by Los Angeles police during the month of February 1923.⁹⁰ The newspaper explained: “After being used as evidence against peddlers and addicts, on whom they were found, the drugs are issued to hospitals and State institutions by the Pharmacy Board.”⁹¹ The article was printed next to an account of a raid by the city’s “hop squad,” under the state inspector’s command, on a Chinatown “opium den,” where the team seized \$1700 in “narcotics, together with a number of pipes and other furnishings of the place.”⁹² This seizure entailed a pursuit “through devious passages and up a short, narrow stairway, but the fleeing addicts had escaped to the roofs of the adjoining buildings.”⁹³ To illustrate the story, one of the officers lay on a cot beside a table of paraphernalia, pipe to his lips, to pose as an opium smoker for a photograph.⁹⁴

Even when seized drugs could not be sold for a profit, their public destruction could serve as a deterrent to future crime and satisfy prohibitionists that enforcement was effective. Pharmacy board agents frequently made a public spectacle of destroying seizures by burning piles of collected opium and paraphernalia in the street.⁹⁵ As early as 1912, a San Francisco newspaper printed a photograph of a crowd gathered around a pyre under the headline “Old Sam Sing Beholds a Holocaust for His Good.”⁹⁶ The bonfire was built from \$40,000 in “opium and utensils” and attended by eight pharmacy board

⁸⁷ See, e.g., *Fifty Men Arrested in Raid for Opium*, S.F. CHRON., Mar. 19, 1919, at 10.

⁸⁸ *Opium Smoking Outfit Worth \$1,500 Seized*, OAKLAND TRIB., July 31, 1922, at 7.

⁸⁹ *Dope from Many Raids Shipped North*, L.A. TIMES, Mar. 13, 1923, at III.

⁹⁰ *Board Gets Seized Drugs*, L.A. TIMES, Mar. 13, 1923, at III.

⁹¹ *Id.*

⁹² *Opium Den Raided by Police*, L.A. TIMES, Mar. 13, 1923, at III.

⁹³ *Id.*

⁹⁴ *Id.* at II2.

⁹⁵ See, e.g., *\$25,000 Dope Raid-Seized, Up in Smoke*, S.F. EXAMINER, Aug. 7, 1921, at 15.

⁹⁶ *Pharmacy Board Inspectors Burn on Street Opium and Utensils Worth \$40,000*, S.F. CHRON., May 10, 1912, at 18.

members, including the president, and one inspector, all named by the reporter, who wrote:

Sutherland deluged the pile with kerosene and McKown applied a match. In an instant the flames leaped thirty feet into the air. The costly pipes crackled and curled into strings of charcoal, the opium began to burn and a dense black pungent smoke arose.

Then a strange thing happened. Some wise and charitable gust of wind swirled a great plume of the black smoke toward the window, where Sam Sing sat gazing at the flames like an astounded and grief-stricken mummy.

The dream laden smoke enveloped his old head.⁹⁷

News items about the burning of drugs commonly appeared in cities, usually noting the value of the destroyed contraband in dollars. "That heavy pall of smoke drifting over Police Headquarters, Manhattan, late this afternoon was caused by a fire fed with \$100,000 worth of narcotics, opium pipes and other material seized during the past three months by members of the police narcotic squad," read one account.⁹⁸ "The material is fed to the flames gradually, on a clear and breezy day, for it is probable that too much smoke from the burning habit forming drugs might have a tendency to bring pleasant dreams to those who might inhale the flames too deeply."⁹⁹ In 1913, a federal judge ordered both the destruction *and* sale of property seized in Terre Haute, Indiana, from two Chinese men, neither of whom appeared at the hearing.¹⁰⁰ Items to be destroyed, according to the local newspaper, included:

five pounds of cooked opium, four pounds of boiled gum opium, seven gallons of opium extract, one bag of gum opium, twenty pounds of gum opium boiled, twenty-five empty powdered opium cans, one quart jug of unknown contents, one two-gallon can, one twenty-five-pound tin can, one twenty-five-pound empty opium can, one two-gallon stone jar, a one-gallon crock and eight cans of different sizes.¹⁰¹

To be sold: "brass and copper kettles, jars, spring scales, dipper, sieve and a gasoline stove."¹⁰²

⁹⁷ *Id.*

⁹⁸ *Police Burn \$100,000 in Seized Narcotics*, STANDARD UNION (BROOKLYN, N.Y.), Jan. 16, 1930, at 2.

⁹⁹ *Id.*

¹⁰⁰ *Orders Opium Destroyed*, INDIANAPOLIS STAR, May 17, 1913, at 3.

¹⁰¹ *Id.*

¹⁰² *Id.*

VI. FORFEITING GUILTY AND INNOCENT VEHICLES

The widespread forfeiture of automobiles for drug infractions began as soon as average Americans could afford to drive them. In 1921, the California legislature amended the Poison Act to enable “any duly authorized peace officer” to seize as evidence any automobile “used by or with the consent or knowledge of the owner thereof, to unlawfully convey, carry or transport any cocaine, morphine, heroin, or opium.”¹⁰³ Upon conviction of the driver, a seized car was to pass through the hands of the state board of control, which “shall deliver to the state board of pharmacy such number of said machines as may be needed by the board of pharmacy in enforcing the provisions of this act.”¹⁰⁴ The provision for forfeiture of a vehicle upon conviction for violating the state’s drug laws was similar to that in the new federal law for enforcing national Prohibition.¹⁰⁵ On referendum, California voters had both passed these forfeiture amendments to the poison act and defeated a state alcohol prohibition act.¹⁰⁶ However, the state’s legendary resistance to alcohol prohibition was broken once federal agents began enforcing the Volstead Act. On Election Day in 1922, at least one newspaper printed a report from the head of federal prohibition in California: Enforcement there had netted the United States more than \$1.5 million in “seizures, taxes, fines and other penalties” during October alone, while costing only about \$22,000 including salaries.¹⁰⁷ Statistics for the record-setting month, the official said, showed 46 automobile forfeitures, \$123,207 in taxes and fines, and 903 arrests.¹⁰⁸ California voters that day passed the Prohibition Enforcement Act,¹⁰⁹ enabling the state to field its own profitable enforcement of the Eighteenth Amendment.

The National Prohibition Act situated federal enforcement in the Treasury, which created a Prohibition Bureau to manage the impossible task of forcing millions of Americans to give up their booze.¹¹⁰ The Treasury’s long history of collecting excise taxes on alcoholic beverages inclined it toward forfeiture as an enforcement tactic,¹¹¹ but Congress had placed some safeguards in Section 26, which provided for vehicle forfeiture.¹¹² The loss of a vehicle used to transport

¹⁰³ Act to Amend Poison Act, ch. 581, sec. 2 § 8(g), 1921 Cal. Stat. 978, 979.

¹⁰⁴ *Id.*

¹⁰⁵ See Act of Oct. 28, 1919, ch. 85, § 26, 41 Stat. 305, 315–16 (allowing for forfeiture of a vehicle “[w]henver intoxicating liquors transported or possessed illegally shall be seized”).

¹⁰⁶ *Eleven State Amendments Are Voted Down*, OAKLAND TRIB., Nov. 3, 1920, at 1.

¹⁰⁷ *Enforcement Is Profitable*, SAN BERNARDINO DAILY SUN, Nov. 7, 1922, at 1.

¹⁰⁸ *Id.* The balance of the revenue presumably was derived from some 7,000 gallons of seized liquor, 138,000 gallons of wine, and the forfeiture of property on which 36 moonshine stills had been discovered. *Id.*

¹⁰⁹ Prohibition Enforcement Act, ch. 80, 1921 Cal. Stat. 79.

¹¹⁰ See § 26, 41 Stat. 305, 315–16.

¹¹¹ Kenneth A. Murchison, *Property Forfeiture in the Era of National Prohibition: A Study of Judicial Response to Legislative Reform*, 32 BUFF. L. REV. 417, 420–21 (1983).

¹¹² § 26, 41 Stat. 305, 316.

or conceal alcohol was a criminal penalty upon conviction rather than a separate civil process, and “innocent owners” such as finance companies holding liens on seized cars were protected from losing their interest.¹¹³ But within a few years, the Bureau began testing a new strategy of bringing forfeiture proceedings under the Internal Revenue Code, which had been used since 1866 for enforcing the liquor tax.¹¹⁴ U.S. attorneys drew on the internal revenue law to prosecute automobiles in rem for removing, depositing, or concealing un-taxpaid alcohol rather than attempting to adopt the vehicles under the Volstead Act’s newer provisions.¹¹⁵ The courts, while circumscribing this practice to some extent, never completely barred the Bureau from doing so.¹¹⁶ The number of cars seized by federal prohibition agents increased each year from 1920 (209 cars) to 1933 (12,222 cars).¹¹⁷

Meanwhile, Congress had banned importation of non-medicinal opium in any form in 1909¹¹⁸ and then in 1914 had passed the so-called Harrison Act, an internal revenue law that required registration with the Treasury and payment of a tax in order to possess, buy, or sell any form of opium or cocaine.¹¹⁹ Customs already had been enforcing the opium ban, but enforcement of the Harrison Act was uncertain until it was folded into the new Prohibition Bureau.¹²⁰ In practical terms this union meant that both drugs and alcohol were policed together by federal agents. But the narcotics division was far less successful with forfeiting automobiles under the Internal Revenue Code; after just a few years, the Eighth Circuit Court of Appeals held that Section 3450 of the Revised Statutes could not be applied to Harrison Act forfeitures.¹²¹ Thereafter the division sought to apply Sections 3061 and 3062 of the Revised Statutes—customs forfeiture provisions dating from the 1866 Smuggling Act—to narcotics forfeitures, reasoning that the vast majority of smoking opium, opium derivatives, and cocaine found in violation of the Harrison Act would necessarily have been imported illegally.¹²² In order to avail themselves of the customs laws, the narcotics agents had to turn the cars over to customs collectors

¹¹³ *See id.*

¹¹⁴ Murchison, *supra* note 111, at 427–28.

¹¹⁵ *Id.* at 428.

¹¹⁶ *Id.*

¹¹⁷ BUREAU OF INDUS. ALCOHOL, U.S. TREASURY, STATISTICS CONCERNING INTOXICATING LIQUORS 95 (1933). The numbers for each year from 1921 to 1932 are 706, 1886, 3977, 5214, 6089, 5935, 7137, 6934, 7299, 8633, 8499, and 11,833. *Id.*

¹¹⁸ Act of Feb. 9, 1909, ch. 100, 60 Stat. 614, 614.

¹¹⁹ Harrison Narcotics Tax Act, ch. 1, §§ 1–12, 63 Stat. 785, 785–90 (1914).

¹²⁰ *See* Audrey Redford & Benjamin Powell, *Dynamics of Intervention in the War on Drugs: The Buildup to the Harrison Act of 1914*, 20 INDEP. R. 509, 511–12 (2016) (noting the difficulty of drug enforcement prior to the adoption of the Harrison Act).

¹²¹ *United States v. Mangano*, 299 F. 492, 496 (8th Cir. 1924).

¹²² *See* Memorandum from R.C. Valentine, Head of Law Division, Bureau of Narcotics, to Mr. Anslinger, Comm’r, Bureau of Narcotics 1, 9–10 (July 21, 1932) (on file with National Archives & Records Administration, RG 170, Subject Files, Box 47) [hereinafter National Archives].

to be forfeited; moreover the customs statute did not work exactly like the internal revenue statute, requiring an uncomfortable period of adjustment.¹²³ For example, while the language of the Harrison Act made possession of the newly illicit substances without a doctor's prescription presumptive evidence of guilt, that language applied only to a criminal proceeding.¹²⁴ The crucial element in forfeiture proceedings under the customs laws, on the other hand, was establishing probable cause for the initial seizure.¹²⁵ Narcotics agents had to convince judges that they knew a suspect's car contained narcotics *imported* contrary to law, or that the suspect knew them to be illegally sourced.¹²⁶ Other enforcement matters also arose. According to the language of the customs law, the contraband would have to be found inside the car at the time of the search, and the seizure would have to be made on the spot.¹²⁷

Yet seizures of drugs, alcohol, and cars continued apace, with federal agents from all corners of the Treasury setting the tone with a brusque and merciless style of enforcement. The press did not report on prohibition raids in order to inspire outrage over hidden motives or strongarm tactics. Rather, they aimed at readers' retributive and moralistic impulses in a distinct genre of tales about dangerous rascals who got their comeuppance. In a brief on the 1922 seizure by Memphis police of "narcotic drugs, imported whisky [sic] and automobiles valued at almost \$35,000," the reporter, though failing to list the names of those detained, provided this bit of local color: "In one house raided, where two stills were located, the walls of the room used for distilling purposes, were covered with framed Biblical passages."¹²⁸ Reading these un-bylined stories a century later, other striking elements are the overreliance of reporters on law-enforcement sources and the lack of curiosity about suspicious assertions. This introduction to a 1921 news report captures the breathlessness of media coverage of cooperative raids that often captured drugs, alcohol, and property—and could result in death:

Eighteen Federal agents in a raid at 5 o'clock yesterday morning seized narcotics and liquor said to be worth \$1,000,000, shot at least five Greek sailors, blackjacked about twenty more, made 327 prisoners, and seized a 15,000-ton ship, the King Alexander, anchored alongside Pier 22, at the foot of Atlantic Avenue, Brooklyn.¹²⁹

The article grows wilder from there, relating how customs officers, excluded from the raid due to suspicions of collusion with the smugglers, fired on the

¹²³ *See id.*

¹²⁴ Harrison Narcotics Tax Act, ch. 1, § 2, 63 Stat. at 786.

¹²⁵ *See* Letter from Victor E. Anderson, U.S. Attorney, to Brien McMahon, Assistant Attorney General 1, 2 (Dec. 22, 1937) (on file with National Archives).

¹²⁶ *Id.*

¹²⁷ *See id.*

¹²⁸ *Liquor, Automobiles and Drugs Seized*, ATLANTA CONST., Mar. 23, 1922, at 18.

¹²⁹ *5 Shot in \$1,000,000 Drug Raid, 1 Missing; Greek Liner Seized*, N.Y. TIMES, Sept. 10, 1921, at 1 (numbers as in original).

narcotics agents from the shore; how the alleged ringleader of the smugglers disappeared overboard with \$34,000 cash; how customs and narcotics agents quarreled over custody of the captured drugs afterward; how narcotics agent and squad commander Frank J. Fitzpatrick had committed suicide one hour after the raid, in the washroom of the ferry house, by shooting himself in the heart; and how the raid had commenced after a narcotics agent had arranged to purchase some of the drugs, but then not having enough cash, used money “composed of \$1000 bills said to have been formed by cutting 0s out from ten-dollar bills and pasting two of them after each \$10 on genuine ten-dollar bills.”¹³⁰

While deaths were only occasionally reported, the undercover drug purchase was a staple element of raid accounts.¹³¹ In a San Francisco item published in 1922: “Federal narcotics agents, posing as ‘drug dealers,’ yesterday seized 598 bottles of cocaine, with a market value of more than \$5000, together with two valuable automobiles, and arrested four persons on charges of violating the Harrison narcotics act.”¹³² In 1927, the *Washington Post* reported that federal narcotics agents had seized eleven cars registered to a single owner, August Scontrino, after he reportedly agreed to sell \$62,500 worth of morphine to undercover agents.¹³³ This seemed to justify a sweeping seizure of the man’s property:

Scontrino carried an automatic. A search of the house revealed four more automatics and 25,000 rounds of ammunition. Five touring cars, the license plates of which revealed that they were the property of Scontrino, were found in the block. Six other automobiles were found listed under the same name. Officers said the fleet of automobiles was used in transporting narcotics throughout the South.¹³⁴

Two San Diego police officers joined a state narcotics agent on an undercover operation in 1930.¹³⁵ They bought forty-five dollars’ worth of heroin from a woman using marked bills; followed her home, where they searched her house and found more heroin; and confiscated her car, where they said the drug sale had taken place.¹³⁶

The Treasury embraced inter-agency cooperation in a series of large-scale raids. In 1926, according to the *Associated Press*, “forces of secret service men, narcotic inspectors and prohibition agents cooperated” in Miami-area raids netting thirty-five arrests and the confiscation of eight automobiles, one truck, and two boats as well as 9600 quarts of liquor.¹³⁷ The windfall in automobiles

¹³⁰ *Id.*

¹³¹ In 1934, a federal agent reportedly shot a suspect *during* an undercover drug buy. *See Five Seized in Dope Net*, L.A. TIMES, June 3, 1934, at 22.

¹³² *Agents Seize \$5,000 in Drugs and Nab Four*, S.F. CHRON., Jan. 19, 1922, at 2.

¹³³ *3 Men and 11 Autos Seized in Drug Raid*, WASH. POST, Mar. 18, 1927, at 3.

¹³⁴ *Id.*

¹³⁵ *Narcotics Cache Found*, L.A. TIMES, July 5, 1930, at A6.

¹³⁶ *Id.*

¹³⁷ *Arrest 39 in Big Florida Rum Raids*, BOS. GLOBE, July 18, 1926, at 2.

and contraband was also shared across departments, particularly for law enforcement purposes; this snapshot of vehicle seizures, auctions, and adoptions by Treasury bureaus was offered in support of allowing the Department of Labor to receive forfeited cars “for use in the enforcement of the immigration laws”:

Under the act of March 3, 1925, vessels or vehicles summarily forfeited to the United States may be used for customs or prohibition enforcement and forfeitures by decree of court, upon application to the Secretary of the Treasury, may be delivered to the Treasury Department for the same purpose, in lieu of being sold under existing law.

During the fiscal year 1927, 1,293 automobiles were seized by customs patrols, of which 215 were retained for customs use, 185 were transferred to the Bureau of Prohibition, and 454 were sold at public auction. The balance of these seizures were either returned or being held as a result of litigation. Those sold at auction brought in proceeds of \$46,760.

The Bureau of Prohibition used 541 confiscated automobiles during the same fiscal year in the enforcement of the national prohibition act and the so-called Harrison Narcotic Act. The seizures totaled 7,137 automobiles and the net proceeds from those sold were \$105,093.65.¹³⁸

One result, perhaps, of the practice of prosecuting liquor law violators under the revenue laws was that enforcement did not stop once Prohibition ended. The Alcohol Tax Unit continued to seize thousands of cars yearly; customs enforcement work, too, continued apace.¹³⁹ One broad post-repeal enforcement effort involved the Alcohol Tax Unit, the Bureau of Narcotics, and customs across multiple cities, as the *New York Times* reported: “Hurling the full strength of an enforcement army of nearly 12,000 men against law violators, the Treasury delivered a crushing blow today to counterfeit, illicit distilling, narcotic and smuggling rings in one of the most spectacular drives of its kind ever staged.”¹⁴⁰ The agents had arrested 1909 people over the course of a single day and were still arresting more.¹⁴¹ “Property valued at hundreds of thousands of dollars was seized. This included automobiles, boats, illicit stills, distilled spirits, narcotics and jewelry.”¹⁴² Customs alone had seized property worth \$1.5 million, according to the reporter.¹⁴³ “There were many unusual seizures, including horses and other live stock [sic], grain, flour, potatoes, beans, wool, hides, . . . fish, and, in Montana, a stump puller.”¹⁴⁴ The Alcohol Tax Unit

¹³⁸ H.R. REP. NO. 70-1081, at 1 (1928).

¹³⁹ *U.S. Arrests 2,000 in Surprise Raids on Nation's Gangs*, N.Y. TIMES, Mar. 16, 1935, at 1.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

seized “851 stills, 37,450 gallons of spirits and 110 automobiles.”¹⁴⁵ As another writer framed the 1935 cooperative enforcement:

From land, sea and air, combined forces of the Coast Guard, Secret Service, Internal Revenue, Intelligence Unit, Customs Bureau and Alcohol Tax Unit struck at every part of the underworld over which the Treasury has jurisdiction.

After 72 hours of almost unceasing warfare without precedent in American police annals, bootleggers, drug dealers and counterfeiters everywhere could count these among their losses:

Nearly \$2,500,000 tossed into the lap of Uncle Sam in the form of fines and seizures; 44,662 gallons of liquor taken out of illicit circulation; more than \$1,000,000 in bogus bills and the paraphernalia for making that many more destroyed; the wreckage of an illegal rum-making industry capable of producing 219,866 gallons a day.¹⁴⁶

Some instances of federal drug enforcement ending in automobile forfeiture now appear aimed at particular people and particular cars. In the Territory of Hawaii in 1937, federal narcotics agents arrested 32-year-old Beatrice Adams, along with nine other women, after raiding their Honolulu apartment building.¹⁴⁷ Apprehended July 13, Adams was charged with possession, transportation, and concealment of narcotics, posted bond on July 14,¹⁴⁸ and was indicted by a grand jury for possession of 155 grains (about a third of an ounce) of opium on August 26.¹⁴⁹ On September 4, her dead body was found at the foot of a cliff and subsequently identified at the morgue by narcotics officers.¹⁵⁰ The more credulous and sensational of the competing major Honolulu dailies reported that Adams’ fear of being busted for “white slavery” had led her to jump to her death.¹⁵¹ “Persecution in the form of ostracism from her former underworld associates may have been the dominating factor in the suicide of the woman, according to opinions expressed in federal law enforcement circles today,” read the account.¹⁵² “Since the raid on the Rose Rooms by narcotics officers several weeks ago, she had been harassed by other women of the underworld who blamed her for putting them ‘on the spot,’ a federal officer

¹⁴⁵ *U.S. Arrests 2,000 in Surprise Raids on Nation’s Gangs*, *supra* note 139, at 1.

¹⁴⁶ *U.S. Aid [sic] Shot as Round-Up Is Continued*, WASH. POST, Mar. 17, 1935, at 1.

¹⁴⁷ *Eleven Taken in Two Raids Held in Jail*, HONOLULU ADVERTISER, July 14, 1937, at 1; *Holt Indicted by U.S. Jury*, HONOLULU ADVERTISER, Aug. 28, 1937, at 1. Beatrice Adams was also known as Zola Knight. *Id.*

¹⁴⁸ *Zola Knight, 32, Bound Over to U.S. Grand Jury*, HONOLULU ADVERTISER, July 15, 1937, at 5.

¹⁴⁹ *Holt Indicted by U.S. Jury*, *supra* note 147, at 1.

¹⁵⁰ *Woman Dies in Jump Off Pali*, HONOLULU STAR-BULL., Sept. 4, 1937, at 1.

¹⁵¹ *Id.*

¹⁵² *Id.*

said.”¹⁵³ More likely, Adams had been targeted by narcotics agents because of her local popularity as a night club performer under the stage name Zola Knight.¹⁵⁴ What had not been reported was the government’s seizure of Adams’s 1937 Packard convertible, a libel against which was filed the day of her indictment.¹⁵⁵ Although the criminal drug charge was dismissed after she died, the civil suit went forward, with the government asking the court to turn over her car for use by the head of the narcotics division in Honolulu.¹⁵⁶ Both the finance company holding a lien on the car and Adams’s brother, who had also been arrested by narcotics agents, contested the forfeiture (although her brother did not appear in person, having agreed to leave the island as part of a plea bargain for a suspended prison sentence).¹⁵⁷ The claimants protested the U.S. attorney’s presenting as evidence a note Adams was supposed to have written confessing that she had used the car to transport the opium; but the judge allowed it, so the U.S. attorney asked for a directed judgment on whether the agents had probable cause to seize the car.¹⁵⁸ The answer was yes.¹⁵⁹ Perhaps flustered by this turn of events, both claimants’ lawyers failed to discharge the burden of proof thus laid upon them to establish the dead woman’s innocence and thereby that of her late-model convertible.¹⁶⁰ A jury found for the United States.¹⁶¹

In 1950, a Pittsburgh newspaper reported that jazz singer Billie Holiday’s “snazzy \$5,000 Lincoln” had been seized in San Francisco.¹⁶² “The royal blue, specially built sedan, topped by a cream-colored leatherette top, was impounded” after her chauffeur was arrested for drug possession.¹⁶³ A follow-

¹⁵³ *Id.*

¹⁵⁴ The initial newspaper report listed Beatrice Adams as one among ten women arrested, but as Zola Knight she occupied the lead and the headline of subsequent coverage, even before her death. *Id.* Her brother, James Byron Adams, arrested and charged with drug possession on the same day, had recently performed in a community theater production of *The Criminal Code*, a Martin Flavin play set in a prison that explored cruelty in the American justice system. Edna B. Lawson, *Players Offer Smashing Hit in “Criminal Code,”* HONOLULU ADVERTISER, May 21, 1937, at 3 (noting “Byron Adams is horrifying as the drug sodden Runch”). The play was popular; it had run on Broadway and its second Hollywood film adaptation was then in production. Mildred Martin, *Gripping Prison Drama Revived as “Penitentiary,”* PHILA. INQUIRER, Feb. 7, 1938, at 9. Flavin’s wife died by falling from a cliff outside their home near Santa Cruz, California, two months after Beatrice Adams died. *Mrs. Flavin’s Body Found on Beach at Point Lobos*, OAKLAND TRIB., Jan. 6, 1938, at 20.

¹⁵⁵ See Letter from Ingram M. Stainback, U.S. Attorney, to the U.S. Attorney Gen. 1, 1–3 (Aug. 6, 1938) (on file with National Archives) [hereinafter Stainback Letter].

¹⁵⁶ *United States v. One Packard Convertible Coupe*, No. 389 Civ. (D. Haw. July 14, 1938).

¹⁵⁷ *Adams to Leave*, HONOLULU STAR-BULL., July 15, 1937, at 7.

¹⁵⁸ See Stainback Letter, *supra* note 155, at 1–3.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² “Lady Day’s’ Car May Be Seized,” *supra* note 4, at 1.

¹⁶³ *Id.*

up piece in the same paper six months later read, “Billie Holiday’s \$5,500, royal blue Lincoln sedan—which makes Gov. Earl Warren’s Cadillac look very mediocre—has been officially awarded to the state of California.”¹⁶⁴ The chauffeur had been sent to the state prison at San Quentin.¹⁶⁵

VII. ROUTINIZING AND BUREAUCRATIZING AUTOMOBILE FORFEITURES

In 1952, political columnist Peter Edson described automobile forfeiture as a “standard government practice . . . few people know about,” poking fun at a federal administrator who “was driven up to the White House the other day in a snazzy blue Cadillac.”¹⁶⁶ When some reporters asked the official about the car, the man explained that “the government—and the taxpayers—didn’t buy this car for him. It was seized by the Treasury’s Bureau of Narcotics agents from some big dope peddler.”¹⁶⁷ Edson, in extensive syndication based on his ability to put government jargon into plain language, explained, “[w]henver an automobile is seized in the arrest of anyone for violation of federal law, the car is held in custody of the U.S. marshal until a court issues an order for its disposition. The seizing agency has a right to requisition the car if it wants it.”¹⁶⁸

Indeed, Treasury forfeiture of cars was routine to the point that bureaucrats included it in their budgets and sometimes eyed its expansion as a source of additional revenue.¹⁶⁹ Frederick Evans, a finance officer for the Bureau of Internal Revenue, told Congress in 1951 that he anticipated replacing 100 cars in the department’s aging fleet of 1,380 with late-model forfeitures over the coming year.¹⁷⁰ Senator Harley Kilgore wanted to know more about the Treasury’s request to purchase new cars; Evans replied that the Bureau “has been endeavoring to meet its needs by seizing cars and having them forfeited to the Government for official use,” but that the cars it seized increasingly were too old and worn to adopt.¹⁷¹ Dwight Avis of the Alcohol Tax Unit helped explain:

As Mr. Evans has indicated, while our seizures of automobiles are rapidly reaching the prewar level of approximately 2,000 a year, yet a great part of those cars are what you might call junk.

¹⁶⁴ *Billie Holiday Loses Auto*, PITT. COURIER, Apr. 7, 1951, at 5.

¹⁶⁵ *Id.*

¹⁶⁶ Peter Edson, Opinion, *Saving for Taxpayers*, BAKERSFIELD CALIFORNIAN, Oct. 7, 1952, at 19.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Treasury and Post Office Department Appropriations, 1952: Hearing Before the Subcomm. of the S. Comm. on Appropriations*, 82d Cong. 102–03.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

In other words, the cars are old. They have over 40,000 and 50,000 and 60,000 miles on them when we seize them, and some of them much more. Many of them are 1937, 1938, 1939, and 1940 models.

Senator KILGORE. It is not like the prohibition days when you used to pick up Cadillacs, is it?

Mr. AVIS. It is not like before the war, Senator. An automobile costs so much money today. We have some difficulty in acquiring cars. The courts are much more apt to return the car to the finance company, where there is a lien of, say, \$1200 or \$1500 on it. That complicates our problem.

Senator KILGORE. You also have this long-time credit proposition, which you did not have before, and cars used to be liquidated in 12 months or so. Now they have a longer period of time to liquidate.

Mr. AVIS. That is true, sir.

Senator KILGORE. The bootlegger buys on the longest possible time.

Mr. AVIS. Yes.¹⁷²

In 1955, Chester MacPhee, collector of customs at San Francisco, told a congressional committee that his area's thirty-eight enforcement personnel should be tripled, but that the expense of new hires could be mitigated through enforcement.¹⁷³ "A substantial portion of the cost . . . would be returned to the taxpayer as the results of fines and penalties from increased seizures, in addition to payments of duties on merchandise now brought in without such payments due to lack of proper coverage," MacPhee said.¹⁷⁴ "In addition, the war on narcotics would be intensified."¹⁷⁵ He explained that his thirty-eight agents made ten to twenty automobile seizures each year of cars brought in by boat and driven off the dock with smuggled alcohol or tobacco inside.¹⁷⁶ Recently, for example, the discovery of a late-model car with \$150 worth of liquor in the trunk fetched \$600 in fines, he said, and:

In addition to that, of course, they forfeit the vehicle. That vehicle comes into the custody of the Government. It is used by the General Services Administration or the Treasury Department in another assignment or that [car] might very well be sold by the United States marshal and that money turned into [sic] the Treasury Department. . . . If we had adequate personnel to do this

¹⁷² *Id.* at 103–04.

¹⁷³ *Traffic in, and Control of, Narcotics, Barbiturates, and Amphetamines: Hearings Before the Subcomm. on Narcotics of the H. Comm. on Ways and Means*, 84th Cong. 852 (1955).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

job there is one instance where we might double or triple that thing, where the revenue would come into the country for the personnel we use.¹⁷⁷

Also, MacPhee said, his agents routinely caught and fined cigarette smugglers, then gave the seized contraband away to veterans' hospitals.¹⁷⁸

State and local drug warriors were also busily forfeiting cars in the 1950s. In October 1952, according to a newspaper report, 283 cars were seized and forfeited in southern California while 73 others were "impounded on suspicion but later released."¹⁷⁹ After running through fifteen forfeiture claims in a single day and finding for the state in each case, Los Angeles Superior Judge Frank G. Swain explained that "one pill, or a cigarette butt in an ash receiver can be evidence to send the responsible driver or car owner to jail, and to impound the car for forfeiture proceedings."¹⁸⁰ Hiding narcotics in a car, the reporter added, is "simply an invitation for a search."¹⁸¹ Judge Swain explained the court's understanding of the statute's intent:

We believe the law which provides for forfeiture of cars used in illegal narcotics traffic is a deterrent to such traffic Persons involved know the penalty is losing the car. I've heard more than one person say, "I can do six months standing on my head, but I hate to lose my car."¹⁸²

A far cry, in its implementation, from depriving large-scale drug traffickers of the instruments and profits of their crimes, such forfeiture harmed ordinary people. In 1956, Wadie Shaheen, a resident of a working-class neighborhood in southern Los Angeles, wrote a letter to his councilman about his 19-year-old son, Bob.¹⁸³ Arrested in possession of marijuana, Bob had spent a month in the San Diego County Jail and then had been transferred to a youth work camp after his conviction.¹⁸⁴ The events, Wadie wrote, were "an unfortunate blow to his Mother and myself who have raised four children in a decent and upright manner as decent citizens"; moreover, it was the first time any of their children had run afoul of the law.¹⁸⁵ But, Wadie wrote, the Shaheens took consolation in knowing not only that Bob had learned his lesson but that they themselves had gained an education on "such a very bad condition that is sweeping our Country."¹⁸⁶ The only remaining problem was that the state had impounded the family car, a 1955

¹⁷⁷ *Id.* at 853.

¹⁷⁸ *Id.*

¹⁷⁹ *Dope-Toting Cars Seized by State*, L.A. TIMES, Oct. 5, 1952, at 36.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ Letter from Wadie Shaheen to Councilman Allen 1 (Apr. 21, 1956) (on file with Edmund G. Brown Papers, Bancroft Library Collection No. BANC MSS 68/90 c, Carton 98, Folder 1) [hereinafter Brown Papers].

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

Mercury that Bob had been driving when he was arrested, on which the Shaheens still owed \$2400.¹⁸⁷ He wrote:

[W]e feel that our boy is paying his penalty and we hope that the State can consider our side of the story as we are ordinary working people and can ill afford to lose the car and the equity we have in it. Our son has co-operated with the Authorities in every way and we are looking forward to the time when he will be back out of this predicament and we can help him rehabilitate himself and get back to a normal life and we also need the car to carry on his and our working conditions. We feel we have suffered enough and hope the Court will be kind enough to help us retain our car.¹⁸⁸

The Shaheens' hope would prove vain, even though the councilman, Don Allen, wrote a sincere personal plea to California Attorney General Edmund "Pat" Brown, Sr., asking him to release the car to the family.¹⁸⁹ "I am sure the law is made on the basis of justice and equity," Allen wrote, but, "It seems rather cruel. . . . I know the family's condition and they just cannot afford to go ahead and pay the balance of \$2400 on that car and then not to have its use. They are just not that kind of people."¹⁹⁰ Moreover, Allen wrote, the father "went all out to see that the boy cooperated 100% with your people. . . . The boy, through the counsel of his father, also has shown his willingness to aid and assist the law, after seeing the enormity of the situation."¹⁹¹ In a memo to Brown about the councilman's letter, Assistant Attorney General Frank Mackin also referred to cooperation; Mackin had arranged for Bob to meet with two state narcotics agents, but Bob "had no helpful information to give them" and the agents were "definitely opposed, naturally, to returning the car" because it had been used to transport seven pounds of cannabis, presumably to sell, from Tijuana, Mexico.¹⁹² "We are filing on and forfeiting cars all the time where a few [marijuana] cigarettes are found in the car—sometimes hardship cases on the parents," Mackin wrote.¹⁹³ In turn responding to Allen, Attorney General Brown wrote, "I think you should know that the law intends that innocent persons should sometimes suffer, as they probably do in this case. This is done because narcotics are such a horrible thing."¹⁹⁴

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ See generally Letter from Don A. Allen, Councilman, Seventh District, to Edmund G. Brown, Attorney Gen., State of Cal. 1 (Apr. 24, 1956) (on file with Brown Papers, Carton 98, Folder 1).

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² Memorandum from Frank J. Mackin to Attorney Gen. Brown 1 (May 1, 1956) (on file with Brown Papers, Carton 98, Folder 1).

¹⁹³ *Id.*

¹⁹⁴ Letter from Edmund G. Brown, Attorney Gen., to Don A. Allen, Councilman, Seventh District 1 (May 3, 1956) (on file with Brown Papers, Carton 98, Folder 1).

That pretty much everyone in 1950s California agreed about the horrible nature of drug trafficking and addiction could hardly be overstated. Rarely does public opinion coalesce so completely around stamping out a perceived social ill through whatever measures can be taken at a reasonable cost to taxpayers. But this exchange of letters reveals how expensive assets were also used as leverage to turn drug defendants into informants. The effort to extract information from Bob Shaheen through his father, who stood to owe \$22,000 in today's dollars¹⁹⁵ on the seized car unless the narcotics agents could be satisfied, was viewed by bureaucrats as justified by the state's wartime footing.

In May 1958, Attorney General Brown's office wrote to the state director of finance to ask permission for the Bureau of Narcotic Enforcement to use forfeited cars instead of state-issued cars "for stake-outs, as meeting places with dealers, addicts and underworld characters, and for the tailing and pursuing of other automobiles."¹⁹⁶ In addition to their drab appearance, the state's standard four-door sedans manufactured by Ford, Chevrolet, or Plymouth "have often been driven so many miles that proper tailing and pursuit [of suspects] is impossible."¹⁹⁷ The unremarkable cars had ruined good cases repeatedly: "Dope peddlers are, of course, very conscious that they might be dealing with law enforcement agents in their transactions," a member of Brown's staff wrote.¹⁹⁸ "Undercover agents tell of cases where peddler drivers of cars in which they are riding recognize a car following them as having the general appearance of a State car. This, of course, ends all negotiations for a narcotic purchase."¹⁹⁹ Given that the "fine police art" of tailing suspects required cars both powerful and nimble, the letter suggested that the Bureau

obtain its cars exclusively from forfeited vehicles which have been seized because of narcotic violations Selection would be made of flashy convertibles, hardtops and such other cars which are of the type generally used in the narcotic traffic, and which, in the opinion of the Bureau, would not be suspected. They would also be chosen for their get-away and power qualities so that they may cope with situations so frequently found in narcotics law enforcement.²⁰⁰

VIII. CONCLUSION

Histories of drug policy offer convincing arguments that prohibition does *not* achieve the purported goal of curbing recreational drug use; rather, it serves

¹⁹⁵ Calculation of Inflation for \$2400 from 1956 to 2018, INFLATION CALCULATOR, <https://westegg.com/inflation/> [<https://perma.cc/M2XH-X7EN>] (enter amount of money and years in fields; then submit).

¹⁹⁶ Letter from Norman Elkington, Chief Assistant, Attorney Gen., to John M. Pierce, Dir. of Fin. 1–2 (May 20, 1958) (on file with Brown Papers, Carton 98, Folder 1).

¹⁹⁷ *Id.* at 1.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 2.

other hidden agendas.²⁰¹ Yet each generation seems to convince itself and its lawmakers that the current moment is an unprecedented crisis of drug abuse. The detriments of opioids, while quite real, have always been misunderstood and exaggerated; and the supposed urgency of confronting “the drug evil”²⁰² has frequently provided a consensual pretext for unconstitutional policing and disproportionate penalties. Property rights are not the only rights affected by drug-related forfeitures, which violate the spirit of equal protection by exacting extraordinary penalties on some that cannot be had on others guilty of the same crime and by encouraging the arrest and prosecution of some offenders but not others. Used writ small for highly discretionary leverage over drug-involved citizens and writ large to increase enforcement capacity, forfeiture adds up to the great detriment of personal liberty. This problem, with its extensive history, manifests from day to day in interactions with city police and sheriff’s deputies. Americans have waited supportively for the improvements in public health and safety long promised by drug warriors. But if drug-related asset forfeitures have failed to secure them, and if instead such forfeitures primarily generate revenue for police forces and bolster public support for continued prohibition, then maybe forfeiture should be re-relegated to tax law.

Certainly forfeiture’s use to collect taxes is firmly situated in the nation’s legal past, but the tax-as-prohibition arrangement has been rejected as unconstitutional.²⁰³ The problems with modern forfeiture have more to do with longstanding cultures of drug law enforcement—with the corruption and meanness of spirit that seem to spring from the daily grind of the drug wars. It would be better if the entire motivation for forfeiture was financial. But it is not; and neither is the penalty purely financial for those who experience it. Forfeitures are also pursued in order to inflict humiliation on offenders, to win leverage by placing family or friends in jeopardy, to offer the public misleading proof of effective enforcement, and so on. In today’s drug wars, the arbitrary peril of possible forfeiture of an automobile or of real estate is certainly analogous in nature to “tough” sentencing. While hearing the arguments in

²⁰¹ See generally KATHLEEN J. FRYDL, *THE DRUG WARS IN AMERICA, 1940–1973* (2013) (to closely monitor inner cities and to project state power abroad); SUZANNA REISS, *WE SELL DRUGS: THE ALCHEMY OF U.S. EMPIRE* (2014) (to amass advantageous wartime arsenals of prohibited drugs); Matthew D. Lassiter, *Pushers, Victims, and the Lost Innocence of White Suburbia: California’s War on Narcotics During the 1950s*, 41 J. URB. HIST. 787 (2015) (to construct a white suburban utopia contrasting with a dark, urban drug menace). Cf. LISA MCGIRR, *THE WAR ON ALCOHOL* (2016) (arguing that alcohol prohibition was an unprecedented state-building project largely ambivalent about consumption per se and suggesting that narcotics control has similar bases).

²⁰² This term often appears in historical sources to describe social problems related to recreational drug use, dependence, and the black market. In addition to its current meaning, the opposite of good, an obsolete sense of “evil” referred to complex negative consequences arising from law, policy, or custom. See *The Drug Evil and the Drug Law*, 14 BOS. MED. & SURGICAL J. 394, 394–95 (1919).

²⁰³ *Leary v. United States*, 395 U.S. 6, 12 (1969), *remanded to* 431 F.2d 85 (5th Cir. 1970), *aff’d*, 544 F.2d 1266 (5th Cir. 1977), *reh’g denied*, 548 F.2d 355 (5th Cir. 1977).

Timbs v. Indiana, the Justices, laboring to compare the possible prison sentence for Tyson Timbs' heroin-sale conviction to his Land Rover forfeiture in light of the Eighth Amendment, noted the difficulty of quantifying excessiveness in punishing his crime.²⁰⁴ Justice Alito asked how low "the ceiling of permissible term of imprisonment would have to go in order to justify a holding that a fine of \$42,000 is a violation of the Eighth Amendment"; what, he asked, was the equation between dollars in a fine and time in a prison sentence?²⁰⁵

When Indiana's Solicitor General insisted that the Court must grapple with the history of civil forfeiture,²⁰⁶ he meant that legal precedents supporting the broad deployment of forfeiture by police should be honored. But in drug crimes, a whole set of nonlegal implications arises, including the diminished social status of drug users and truisms about the risks of drug involvement. Chief Justice Roberts himself remarked that Timbs' car was "an instrumentality of the crime," that he had used it to transport drugs to the place he sold them.²⁰⁷ "Normally, I mean, you're carrying the—the drugs in your car, I think it's pretty well established your—your car can be forfeited."²⁰⁸ But exactly why *is* this concept well established? Legal precedent reveals little about why enforcers feel entitled to profit from drug control, or why juries and judges find drug defendants unsympathetic. The whole history of drug prohibition, especially the troublesome cultures of enforcement it fosters, should be part of the conversation as lower courts begin to apply *Timbs* to the pressing question of disproportional punishments. Ideally the courts would employ similar considerations to pare back prison sentences for drug offenders as well.

²⁰⁴ Transcript of Oral Argument at 19–23, *Timbs v. Indiana*, 139 S. Ct. 682 (2019) (No. 17-1091), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2018/17-1091_1bn2.pdf [<https://perma.cc/5Y9A-CEMC>].

²⁰⁵ *Id.* at 22.

²⁰⁶ *Id.* at 52–56.

²⁰⁷ *Id.* at 27.

²⁰⁸ *Id.*